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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER D. COBURN,
Petitioner,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May a court, consistently with this Court's decision last Term in *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983), set aside a jury's finding of age discrimination after the court has held that the plaintiff "clearly" introduced sufficient evidence to establish a prima facie case?

2. In an age discrimination case where the jury, as trier of fact, returns a verdict in favor of the plaintiff, and where the court holds that plaintiff presented sufficient evidence to establish a prima facie case of discrimination, may the court independently weigh the evidence and enter j.n.o.v. in favor of the defendant-employer on the ground that plaintiff failed to prove discriminatory motive by a preponderance of the evidence?

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit is reported as *Coburn v. Pan American World Airways*, 711 F.2d 339 (D.C. Cir. 1983), and appears in the Appendix ("App.") at 1. The opinion of the United States District Court for the District of Columbia granting judgment n.o.v. is not reported.

JURISDICTION OF THE COURT

The Court of Appeals issued its opinion and judgment in this case on June 28, 1983. App. at 1. On July 29, 1983, the court denied petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc. App. at 11,12.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §623 (a) provides in pertinent part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

29 U.S.C. §631 (a) provides that

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

In August 1980, Petitioner Peter D. Coburn, a 43-year-old employee of respondent Pan American World Airways, was terminated through reduction in force. Petitioner filed a civil action alleging age discrimination. The jury returned a verdict in favor of petitioner; however, the trial judge granted respondent's motion for judgment *non obstante verdicto* on the ground that petitioner had failed to establish a prima facie case of age discrimination. The District of Columbia Circuit held, on the contrary, that petitioner had "clearly" introduced sufficient evidence to establish a prima facie case of discrimination. Nevertheless, the court affirmed the entry of j.n.o.v., finding that petitioner had failed to prove discriminatory motive by a preponderance of the evidence "and for a jury to find in his favor it would have to indulge in an impermissible speculation." App. at 10.

The Trial

Petitioner was employed by respondent for 17 years, most recently in a managerial position designated "Reservations Supervisor". In this position, petitioner was in charge of the system which ensured that telephone calls to respondent's Washington, DC offices were answered by an agent as quickly as possible.

On August 18, 1980, petitioner was notified by respondent that he was being released from his position as the result of a reduction in force. Petitioner was the only employee released from the Washington, DC office, and one of only two employees released in the Eastern Central Region of the United States. The other released employee was also over the age of 40.

The reduction in force resulting in petitioner's release was supposed to have been caused by financial reasons, and was

supposed to have been based upon relative performance (*i.e.*, the least capable performer was to be released). However, because respondent retained younger, less competent employees than petitioner, and because shortly after petitioner's release respondent promoted two younger employees to be Reservations Supervisors in the Washington, DC office,[1] petitioner filed a charge of age discrimination with the Equal Employment Opportunity Commission. 29 U.S.C. §626(d).

The administrative process did not afford petitioner any relief, and he timely filed this suit in United States District Court for the District of Columbia alleging violations of the Age Discrimination in Employment Act of 1975, 29 U.S.C. §621 *et seq.*[2] The court's jurisdiction was invoked pursuant to 29 U.S.C. §626 (c)(1). Petitioner timely demanded a jury, as permitted by *id.*, (c)(2).

The case was tried to the jury between March 16 and 19, 1982. The jury heard that petitioner was over the age of 40, and thus was a member of the class protected by the Act. The jury also heard that petitioner was a highly satisfactory employee. Petitioner was assigned the responsibility of managing respondent's telephone reservations system in its Washington, DC office. When he was given this assignment in April 1979, he was instructed to improve the office's Service Quality Level (SQL), which measures the percent of incoming telephone calls answered in 20 seconds. Shortly after petitioner assumed this task, the Washington, DC office ranked number one in SQL ratings of all of respondent's offices in the United States.

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[1]These younger employees were promoted in November 1980 and May 1981.

[2]Petitioner also filed claims of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Those claims, which were tried to the court, were decided adversely to petitioner, but they are not an issue in this petition.

In addition, the jury heard that younger managers than petitioner were retained, and that less than three months after petitioner was released, respondent promoted a young woman to the position of Reservations Supervisor, which petitioner had just vacated. One of respondent's officials testified to the jury that after petitioner's termination, the SQL performance of the Washington, DC office was so "poor . . . [that] a *number of additional people were hired*" to make up the loss.[3]

Respondent argued that its internal procedures required it to terminate the least competent manager, whose identity was determined through the application of a comparative ranking system. According to respondent, although younger managers were retained, they were retained not because they were younger but because they were more competent than petitioner.

However, the jury heard two disinterested Pan Am employees testify that petitioner was far more competent than some of the younger supervisors who were retained, Transcript at 196-97, 229-30; that petitioner was replaced by a younger, less experienced employee barely two months after his release, Plaintiff's Exhibit 16; that the performance of petitioner's office dropped so markedly after his release that additional employees had to be hired, Transcript at 529; and that the average age of the managers in petitioner's office dropped 5 years in just 10 months: from 42.5 years at the time of his release in August 1980, to 38.6 on November 1, 1980, to 37.6 years in July 1981, Plaintiff's Exhibits 13, 16.[4]

The jury also heard Edward Cooper (under 40), the official who made the decision to terminate petitioner, testify about the manner in which he ranked his subordinates. According to

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[3]Testimony of Frederick Kells, Eastern Central Regional Managing Director, Transcript at 529.

[4]The relevant exhibits were in the form of charts displayed to the jury throughout the trial.

Mr. Cooper, he gave one of his younger subordinate managers extra credit during the ranking process for improving his attendance problems, but did not credit petitioner in this area because petitioner had no attendance problems. Transcript at 694-96.

The jury further heard Mr. Cooper testify that he downrated petitioner for not performing the full range of his duties. However, Mr. Cooper also testified that he would not permit petitioner to perform those duties because petitioner was needed to monitor the critical telephone system. Transcript at 680-83.

Petitioner also attempted to introduce direct evidence of discriminatory animus. During his case in chief, petitioner proffered the testimony of William Ferchak, of the International Brotherhood of Teamsters, Airlines Division. Transcript at 583-95. Counsel proffered that Mr. Ferchak would testify that a Mr. Slattery, an official of respondent's Eastern Central Region, where petitioner was employed, had exhibited a bias towards young women.[1] The court rejected the testimony on the ground that "Mr. Ferchak wouldn't dare to testify as has been represented..." Transcript at 595.

Respondent moved for a directed verdict at the close of petitioner's case, and again at the close of all the evidence. The court denied both motions.

The jury, having been instructed correctly that petitioner bore the burden of proving by a preponderance of the evidence that his age was a determining factor in his termination, returned a verdict in favor of petitioner. However, the trial court granted respondent's motion for judgment n.o.v. on the ground that petitioner had failed to establish a prima facie case of discrimination. *Coburn v. Pan American World Airways,*

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[1] "Mr. Ferchak would testify from his personal knowledge that Mr. Slattery had indicated to him that he...Mr. Slattery, preferred to hire young attractive women...because of his sexual interests...." Transcript at 595.

CA No. 81-1086 (D.D.C. May 7, 1982) (Mem. Op. granting j.n.o.v.).[4]

The Decision on Appeal

A Panel of the District of Columbia Circuit affirmed the result, but not the trial court's reasoning. *Coburn v. Pan American Airways*, 711 F.2d 339 (D.C. Cir. 1983) [hereinafter "*Coburn*"]. The Panel agreed that allegations of age discrimination should be analyzed using the standards governing allegations of race and sex discrimination arising under Title VII, and first articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The District of Columbia Circuit had recently applied the *McDonnell Douglas* paradigm to an allegation of age discrimination in *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982), which was tried to the bench because the plaintiff was a federal employee. Adopting that analysis, the Panel stated that

> An inference of discrimination is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was terminated, and (4) was disadvantaged in favor of a younger person.

Coburn, App. at 5 (citation omitted).

Based on that analysis, the Panel held

> ...contrary to the district court, that Coburn created a reasonable inference of discrimination by making out a prima facie case under the ADEA. Coburn was (1) 43 years

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[4]At the same time, the trial court denied respondent's conditional motion for a new trial. However, subsequent to petitioner's appeal, the trial court stated in an indicative ruling that it would grant a new trial if presented with the opportunity. *Coburn v. Pan American World Airways*, CA No. 81-1086 (D.D.C. June 8, 1982) (indicative ruling).

old, (2) acknowledged by all to be qualified as a Reservations Supervisor, and (3) was fired while (4) younger persons were retained and others later promoted. The evidence produced at trial was clearly sufficient to support a jury finding of a prima facie case....

App. at 6 (citation omitted).

The Panel then held that respondent met its statutory burden of articulating a legitimate, non-discriminatory reason for releasing petitioner, *viz.*, "Coburn was terminated when he was evaluated the least productive." App. at 7.

Thus, according, to the Panel, the question was whether petitioner was able to show that respondent's asserted reason was pretextual. *Id.* The Panel held that petitioner failed to meet this burden. The fact that the only other manager released in the reduction was over the age of 40 was "pure coincidence". *Id.* While petitioner alleged that the subsequent promotion of younger women to his position was evidence of pretext, the Panel disagreed, finding that "these employees were only promoted after implementation of a merger between Pan Am and another airline". *Id.*

The Panel determined that respondent followed its procedures "to the letter", App. at 7, without stating the basis for that conclusion. However, the jury had heard that respondent failed to include in the reduction employees from National Airlines (with whom respondent had recently merged), although required by the procedures; and that petitioner's position was sufficiently different from the other managers that he should not have been compared with them. The Panel did not discuss this evidence.

Finally, the Panel rejected petitioner's basic claim that his age was a determining factor in his release as evidenced by the retention of a younger employee less competent than he.

> The reduction in force criteria were specifically designed to determine the "least productive" employee.... While

> Coburn disputed his rating in several regards, he produced no evidence that age was the reason he was rated low.

App. at 9.

Concluding, the Panel found that

> Coburn draws a compelling picture of a long-time loyal employee who may have been treated less than fairly. But the record is devoid of any evidence that age was a "determining factor" in Pan Am's decision to terminate him. Coburn failed to carry his burden of proving discriminatory motive by a preponderance of the evidence and for a jury to find in his favor it would have to indulge in impermissible speculation.

Id. (citation omitted).

Petitioner timely sought rehearing or rehearing en banc, arguing that the Panel's decision was in conflict with this Court's opinion last Term in *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983), and that the decision misinterpreted both *Aikens* and *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). However, on July 29, 1983, the court summarily affirmed the initial decision. App. at 11.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS GOVERNING THE BURDEN OF PERSUASION IN DISCRIMINATION CASES

Petitioner requests that the court's decision in this case be vacated and remanded for two fundamental reasons. First, the court's decision is in conflict with *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983) [hereinafter "*Aikens*"], in which this Court held that where an employer has failed to persuade the trial court to dismiss the action for lack of a prima facie case, "*the fact finder* must then decide" the ultimate question of intentional discrimination. 103 S.Ct. at 1482 (emphasis added). Second, the decision is in direct conflict with this Court's decision in *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) [hereinafter "*Burdine*"], which carefully defined the legal effect of a prima facie case in a discrimination suit.

The introduction of rebuttal evidence does not nullify the power of the jury to infer the ultimate fact. Where a plaintiff "clearly" establishes a prima facie case of discrimination, and where the employer's evidence is aimed entirely at persuading the trier of fact of its proper motives, the jury must be permitted to disbelieve the employer and find discrimination.

A. Under *Aikens*, Where the Plaintiff has Established a Prima Facie Case of Discrimination, the Ultimate Question of Discrimination is for the Trier of Fact

To prevail in a case of discrimination, a plaintiff must first raise an inference of discrimination by establishing a prima facie case. While the elements of such a case will vary with the

facts, the purpose of placing this burden on the plaintiff is to eliminate the most common non-discriminatory reasons for the action complained of. *See Burdine*, 450 U.S. at 254. In a case involving failure to hire or promote, the factors to be eliminated concern minimum qualifications and the absence of a vacancy. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In this case, to establish a prima facie case of unlawful discharge during a reduction in force, petitioner was required to show that he was performing satisfactorily and that younger employees were retained. *See Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981). The Panel determined that petitioner's evidence "clearly" was sufficient to meet his prima facie burden. *Coburn*, App. at 6.[7]

Last Term, this Court again clarified the role of the *McDonnell Douglas* analysis in discrimination cases. The purpose of the analysis is to provide "a sensible orderly way to evaluate the evidence in light of common experience". *Aikens*, 103 S.Ct. at 1482, quoting *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1977). A plaintiff who establishes a prima facie case raises an inference of discrimination because the trier of fact may "presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

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[7]Although petitioner's case raises claims of age discrimination, the court below applied the standards established by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), for cases arising under Title VII of the Civil Rights Act of 1964. Most Courts of Appeals have utilized the *McDonnell Douglas* analysis in cases of age discrimination. *See, e.g., Garner v. Boorstin*, 690 F.2d 1034, 1035 n.2 (D.C. Cir. 1982); *Loeb v. Textron*, 600 F.2d 1003, 1014-16 (1st Cir. 1979); *Smith v. University of North Carolina*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Harpring v. Continental Can Co.*, 628 F.2d 406, 408-409 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58, 60-61 (10th Cir. 1979). *See also Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII").

The ultimate question in these cases, however, is not whether plaintiff has established a prima facie case, but whether he has been the victim of intentional discrimination. *Aikens*, 103 S.Ct. at 1482; *Burdine*, 450 U.S. at 255. Where a plaintiff survives a motion to dismiss, and the defendant "has done everything that would be required of him if the plaintiff had properly made out a prima facie case", the only question in the case is "whether the [action] was discriminatory within the meaning of" the statute. *Aikens*, 103 S.Ct. at 1482.

In a case in which the defendant has presented his evidence of his legitimate, non-discriminatory reasons, the issue of intentional discrimination must be decided by the fact finder. *Id.* The question is one of persuasion: does the trier of fact believe the employer's evidence, or is it persuaded that a discriminatory reason more likely than not motivated the employer. *Id.*, quoting *Burdine*, 450 U.S. at 256. "In short", as the Court explained in *Aikens*, the fact finder "must decide which party's explanation of the employer's motivation it believes." 103 S.Ct. at 1482.

The Court of Appeals' decision in this case usurped the fact finder's power to decide the ultimate factual issue of discrimination. That decision conflicts not only with *Aikens* but with decisions of other Courts of Appeals. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981), is an age discrimination similar to the one at bar. In *Spagnuolo*, the employer had terminated the plaintiff during a reorganization. When the jury returned a verdict in favor of the plaintiff, the employer appealed, arguing that its evidence of a legitimate business reason for its actions required judgment in its favor. *Id.* at 1112-13.

The Fourth Circuit rejected that argument:

> ...the articulation of a legitimate non-discriminatory reason is sufficient to insulate an employer from a directed verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. [However, t]he jury in its

consideration of all of the evidence may still find that the wrong occurred in the manner established by the plaintiff.

Id.

In another age discrimination case, *Tribble v. Westinghouse Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982), the Eighth Circuit similarly held that an employer who rebutted a prima facie case was not entitled to have a verdict directed in its favor:

> We believe that the jury accepted plaintiff's version of the case and thus considered the reasons offered by Westinghouse for plaintiff's discharge to be merely pretextual.

Id. See also Hagelthorn v. Kennecott Corp., 710 F.2d 76, 83 (2d Cir. 1983):

> ...it is for the fact-finder to determine whether it has been established by a preponderance of the evidence that the plaintiff would not have been fired but for his age.

The circumstantial evidence of respondent's motive was in conflict. Respondent argued to the jury that petitioner was released from employment under a system that required termination of the "least productive employee". *See Coburn*, App. at 7. Petitioner introduced evidence that employees younger than he were less competent; that he was replaced by younger employees after his release; and that after he was replaced the performance of his office deteriorated markedly, necessitating the hiring of additional people.

It is a fundamental principle of our system that conflicts in evidence are resolved by the trier of fact. *See, e.g., Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Where the jury is the trier of fact, it has the exclusive authority to reject entirely respondent's explanation and decide that petitioner was the victim of intentional age discrimination. *See Aikens*, 103 S.Ct. at 1482 & n.5. The jury in this case did exactly that, and the courts below erred by setting aside the verdict in petitioner's favor.

B. Under *Burdine*, the Trier of Fact is Permitted to Infer Discrimination from the Evidence Even in the Face of the Employer's Rebuttal

In *Burdine*, this Court carefully defined the legal effect of a prima facie case. The prima facie case raises a mandatory inference of discrimination and "creates a presumption that the employer unlawfully discriminated against the employee." 450 U.S. at 254. The presumption thus created is sufficiently strong that the employer's silence "must" result in judgment for the plaintiff. *Id.* In this case, therefore, a jury that heard petitioner's evidence properly could have returned a verdict in his favor if respondent had introduced no evidence in its case.

Respondent did introduce evidence of its nondiscriminatory reason. According to respondent, its internal procedures required it to terminate the least competent of its managers, and although younger managers were retained, they were retained not because they were younger but because they were more competent than petitioner. The Panel found, and it is not seriously disputed, that with this evidence respondent sufficiently met its burden of production to avoid a directed verdict against it.

However, the Court of Appeals additionally found respondent's testimonial evidence so persuasive that it held that no reasonable jury could have found discrimination in this case. *Coburn*, App. at 8. That decision may be justified only if the court can find respondent's testimony more credible than petitioner's evidence. However, the power to determine credibility rests exclusively in the hands of the jury, and cannot be usurped by the court. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).

The decision below also departs from established case law in its treatment of the inference of discrimination created by the prima facie case. As discussed above, the legal effect of a prima facie case is the creation of a mandatory inference of

discrimination. A satisfactory rebuttal destroys only the mandatory aspect of that inference. This Court has expressly held that a defendant's rebuttal of a prima facie case does not nullify the power of the trier of fact to infer discrimination from all of the evidence:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, *this evidence and inferences properly drawn therefrom may be considered by the trier of fact* on the issue of whether the defendant's explanation is pretextual.

Burdine, 450 U.S. at 255 n.10 (emphasis added).

The jury in this case was *required* to infer discrimination from the evidence before respondent presented its case; *a fortiori* it was *permitted* to infer discrimination from this same evidence at the close of the case. Under the Court of Appeals' decision, respondent's rebuttal not only destroyed the legally mandatory inference of discrimination created by the prima facie case, it effectively rendered *any* inference of discrimination impermissible. That holding clearly is in direct conflict with the plain language of *Burdine*.

While it is apparent that neither the Court of Appeals nor the trial court inferred discrimination from the evidence in this case, where the plaintiff has established a prima facie case the power to make such inferences rests solely with the jury.

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 35 (1944).

The decision in this case violates well-established principles governing entry of judgment n.o.v. In deciding a motion for a directed verdict or for judgment n.o.v., the court is obligated

to view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every favorable inference that can be reasonably derived from that evidence. *See, e.g., Flores v. Pierce,* 617 F.2d 1386, 1389 (9th Cir.), *cert. denied,* 449 U.S. 875 (1980); *Hanson v. Ford Motor Co.,* 278 F.2d 586, 596 (8th Cir. 1960) (Blackmun, C.J.); 9 **C. WRIGHT & A. MILLER,** Federal Practice and Procedure §2524 at 543-44 (1971 ed.).

Viewed in its most favorable light, petitioner's evidence permitted a reasonable jury to infer that he was released, and younger employees were retained, because of his age. However, time and again, the courts below rejected the inference of discrimination in favor of the alternative inference urged by respondent.[8]

The jury's verdict of intentional and willful discrimination was based upon all of the evidence, including the same evidence the court found was "clearly sufficient to support a jury finding of a prima facie case". *Coburn,* App. at 6. That evidence was legally sufficient to support a verdict in petitioner's favor. *Burdine,* 450 U.S. at 255-56. The Court of Appeals improperly set aside the jury verdict, finding that a verdict in petitioner's favor would have to be based upon "impermissible speculation", *Coburn,* App. at 10, for

> [i]t is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or

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[8] *See* App. at 8,9: Petitioner argued that respondent's attempt to induce early retirement on the part of its older managers was evidence of improper motive, but the court found the attempt "humane"; petitioner cited the promotion of two younger women to his position, but the court concluded that the promotions occurred as the result of the merger between Pan Am and National Airlines; petitioner cited the retention of a younger employee whom witnesses identified as less competent, but the court found no evidence the disparity was motivated by discrimination. In each instance, the court set aside the jury's implicit determination that respondent's reasons were mere pretexts for discrimination.

the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems *to them* to be the most reasonable inference.

Lavender v. Kurn, 327 U.S. 645, 653 (1946)(emphasis added).

C. Whether Petitioner Proved Discrimination by a Preponderance of the Evidence is not a Question for the Court, but for the Jury

The Panel ultimately held that petitioner could not prevail on his claim because he "failed to carry his burden of proving discrimination by a preponderance of the evidence...." *Coburn*, App. at 10. The Panel's holding must be reversed because only the jury has the power to weigh the evidence.

It is well-established that in deciding a motion for judgment n.o.v., a court (trial or appellate "may not...weigh the evidence". *See, e.g., Boutros v. Riggs National Bank, D.C.*, 655 F.2d 1257, 1258 (D.C.Cir. 1981). "It is not for the court to weigh the evidence on both sides of a contested issue. To do so is the function of the jury." *Baltimore & O.R.Co. v. Postom*, 177 F.2d 53, 55 (D.C.Cir. 1949). *See also* cases cited in 9 **C. WRIGHT & A. MILLER**, Federal Practice and Procedure §2524 at 543 n.33 (1971 ed.).

The principle is familiar. The trial judge instructed the jury in this case that petitioner would establish his case by a preponderance of the evidence if the "evidence favoring his side of the issue is more favorable *to you* and causes *you* to believe" him. Transcript at 786 (emphasis added). Similarly, the Panel correctly observed that the court is not to weigh the evidence. *Coburn*, App. at 4. Nevertheless, both courts violated these proscriptions and weighed the evidence themselves.

The Panel appears to have based its holding on *Cuddy v. Carmen*, 694 F.2d 853 (D.C.Cir. 1982), which held that an age discrimination plaintiff must persuade the trier of fact by a preponderance of the evidence that his age was a determining factor in the employment decision. *Id.* at 857. *See Coburn*, App. at 5. However, because *Cuddy* involved a suit filed against the federal government, it was tried to the court and not to a jury. *Cuddy's* description of the burden is precisely correct; however, in a case where the trier of fact is the jury, whether plaintiff met his burden is a question for the jury and not for the court.

CONCLUSION

The decision of the District of Columbia Circuit in this case conflicts with this Court's most recent decisions concerning the allocation and burdens of proof arising under the federal discrimination statutes. In addition, the decision conflicts with decisions of other Circuits clearly holding that a jury has the fundamental right to disbelieve the employer's rebuttal evidence and find discrimination when the elements of a prima facie case have been met. The Court of Appeals apparently did not rely on this Court's decision in *Aikens*, for it is nowhere cited in the decision.

For all the foregoing reasons, petitioner urges this Court to grant his petition for certiorari, vacate the decision of the Court of Appeals, and remand that decision for additional consideration in light of *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983), and *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1543

PETER D. COBURN, APPELLANT

v.

PAN AMERICAN WORLD AIRWAYS, INC.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-01086)

Argued April 29, 1983

Decided June 28, 1983

June D.W. Kalijarvi, with whom *George M. Chuzi* and *Pamela A. Shea* were on the brief, for appellant.

Jeffrey S. Berlin, with whom *Richard L. Cys* was on the brief, for appellee.

Before: TAMM and WILKEY, *Circuit Judges*, and MCNICHOLS,* *Senior District Judge*, United States District Court for the District of Idaho.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the court filed by *Senior District Judge* MCNICHOLS.

MCNICHOLS, *Senior District Judge*: Peter Coburn appeals the district court's entry of judgment *non obstante veredicto* (j.n.o.v.) in favor of his employer, Pan Am, in Coburn's action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the ADEA). Coburn contends the order is improper because he made out a prima facie case of age discrimination and the company's purported reason for firing him was a pretext for age discrimination. He protests that the trial court invaded the province of the jury by weighing the evidence and assessing the credibility of the witnesses in order to overturn the jury verdict in his favor. He also contests several evidentiary rulings and the court's verdict as the trier of fact in a companion Title VII sex discrimination case.

Coburn, who served 17 years as a Pan Am employee, was 43 at the time of his termination in August of 1980. He was a management employee classified as a Reservations Supervisor in Pan Am's Reservations and Ticket Office in Washington, D.C. He was one of four Reservations Supervisors, all of whom have the same general managerial responsibilities.

In the late summer of 1980 Pan Am's financial situation was precarious. Top management instituted numerous cost-cutting measures, including a reduction of the work-force. The reduction-in-force was implemented after a Management Retirement Incentive Program failed to produce adequate cost-savings. The reduction-in-force plan implemented by management called for the termination of two management employees in the Eastern Central Region, one from the Washington Reservations and Ticket Office.

Pan Am policy mandated termination of the least productive employee in a designated peer group (groups of

employees performing the same function). After designation of a peer group and its approval by Richard Carlson, Regional Managing Director, a peer group analysis was performed by Edward Cooper, manager of the Washington office. Coburn ranked lowest in his peer group and Cooper recommended his termination. Coburn was notified effective August 18, 1980.

On May 18, 1981 Coburn filed suit under the ADEA seeking both damages and equitable relief. He amended his complaint on July 2 to include a sex discrimination count under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976) (Title VII). Before trial, Pan Am moved unsuccessfully for summary judgment. At trial, after plaintiff's presentation of the case-in-chief, the trial court denied Pan Am's motion for directed verdict. A like motion was denied before the case went to the jury. The jury returned a verdict including special interrogatories in favor of Coburn on the ADEA claim, finding Pan Am willfully terminated him because of his age. As the trier of fact, the trial court found for Pan Am on the Title VII claim. After entry of judgment of the ADEA claim, Pan Am moved for judgment n.o.v. The trial court eventually granted judgment n.o.v. and an alternative motion for new trial, ruling that no evidence supported the jury finding that Coburn was discriminated against because of his age. Coburn appeals the verdict on his Title VII claim, the judgment n.o.v. on his ADEA claim, and several other rulings of the trial court which, because of our disposition of the former issues, we do not discuss. We turn initially to the ADEA claim and the propriety of the trial court's grant of judgment n.o.v.

THE ADEA CLAIM

Standard of Review

The standard for awarding a judgment n.o.v. is the same as that applied when ruling on a motion for a directed verdict. *Vander Zee* v. *Karabatsos*, 589 F.2d 723

(D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). As this court has stated, "the motion should not be granted unless the evidence, together with all the inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Murphy* v. *United States*, 653 F.2d 637, 640 (D.C. Cir. 1981), quoting *Vander Zee*, *supra*, 589 F.2d at 726. Judgment n.o.v.

> is proper only if "there can be but one reasonable conclusion" drawn from the evidence viewed "in the light most favorable to the plaintiffs [in this case], giving them the advantage of every fair and reasonable inference that the evidence may justify", *Foster v. Maryland State Savings and Loan Association*, 191 U.S. App. D.C. 226, 228, 590 F.2d 928, 930 (1978), *cert. denied*, 439 U.S. 1071 (1979).

Metrocare v. *Washington Metro. Area Transit Auth.*, 679 F.2d 922, 924-25 (D.C. Cir. 1982). "The trial court may not assess the credibility of the witnesses or weigh the evidence", *id.* at 925, citing *Boutros* v. *Riggs National Bank, D.C.*, 655 F.2d 1257, 1258 (D.C. Cir. 1981) and if "fair minded people might differ as to the conclusion appropriate", *Murphy*, 653 F.2d at 640, the court must let the jury verdict stand.

The Merits

The evidentiary guidelines governing the proof in discrimination cases were first set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), a suit arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The same analysis is generally applicable in ADEA cases. *Sutton* v. *Atlantic Richfield Co.*, 646 F.2d 407 (D.C. Cir. 1981). We thus face the question whether reasonable persons could have concluded on the basis of the evidence at trial that Pan Am discriminated against Coburn on the basis of his age.

In the recent case of *Cuddy* v. *Carmen*, 694 F.2d 853 (D.C. Cir. 1982), this court articulated the standard for

review of a plaintiff's age discrimination action. To make out a prima facie case "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was 'a determining factor' in the employment decision." *Id.* at 856-57. By adopting the language "a determining factor" this circuit joined several other circuits which now use that standard. *See id.* at 857, n.19. An inference of discrimination is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was terminated, and (4) was disadvantaged in favor of a younger person, *id.* at 857. The court went on to describe as follows:

> Once a prima facie case has been established, the employer has the burden of producing evidence tending to show that the applicant was denied employment for a legitimate, nondiscriminatory reason. If the employer does so, and if his evidence is credible, the plaintiff must show by a preponderance of the evidence that the employer's asserted legitimate reason is merely pretextual. (citations omitted). Once this stage is reached, the order and allocation of proof has served its purpose of bringing "the litigants and the court expeditiously to [the] ultimate question" of discrimination. *Burdine, supra*, 450 U.S. at 253, 101 S.Ct. at 1093. The plaintiff, who at all times retains the burden of persuasion, must then show by a preponderance of the evidence that age was "a determining factor" in the employer's decision.

Cuddy, 694 F.2d at 857.

This analysis is easily adaptable from a failure to hire situation to the context of this case, an allegedly discriminatory discharge. *Metrocare*, 679 F.2d at 922. The issue before us is whether reasonable jurors could have decided on the basis of the evidence at trial that Peter Coburn's age was a determining factor in Pan Am's decision to fire him.

The District Court granted judgment n.o.v. for two reasons. The court first ruled that Coburn failed to prove a prima facie case because none of the evidence at trial would support an inference of discrimination, and for a jury to so infer would be a result of "impermissible conjecture and surmise". *Mattivi* v. *South American Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980). The District Court further ruled that even assuming plaintiff proved a prima facie case, the evidence was insufficient to support a jury finding that defendant's reasons for terminating Coburn were a pretext for discrimination. According to the District Court, the record was devoid of any evidence that Coburn's age was a determining factor in Pan Am's decision to fire him. Because we believe Coburn failed to carry his burden of proving discriminatory motive, we affirm the trial court's judgment.

The District Court rendered its opinion on May 7, 1983. Subsequent to that time, this court decided the *Cuddy* case, in which we articulated the previously outlined framework for analyzing ADEA claims. Thus the trial court did not have the benefit of our reasoning in *Cuddy* for guidance. While the *Cuddy* decision has much bearing on this case, it does not compel us to reverse.

We rule initially, contra to the district court, that Coburn created a reasonable inference of discrimination by making out a prima facie case under the ADEA. Coburn was (1) 43 years old, (2) acknowledged by all to be qualified as a Reservations Supervisor, and (3) was fired while (4) younger persons were retained and others later promoted. The evidence produced at trial was clearly sufficient to support a jury finding of a prima facie case based on *Cuddy*.

Pan Am urges us to require an ADEA plaintiff to prove something extra to make out a prima facie case in a reduction-in-force situation. Pan Am's rationale is that with a reduction-in-force the discharged employee

will virtually always be qualified. Thus, anyone in the protected age group will presumptively have a cause of action under the ADEA. They therefore argue that direct evidence of discrimination should be required to make out a prima facie showing in a reduction-in-force case. *Cuddy* makes it clear that direct evidence of discrimination is not required to prove a prima facie case and create an inference of discrimination. *Id.* at 856-57. We believe the exigencies of a reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the firing. In this manner the employee always retains the burden of proving discrimination while the employer's situation is analyzed on a case-by-case basis.

In the face of Coburn's prima facie showing we now turn to the question of Pan Am's articulated nondiscriminatory reason for firing Coburn. Pan Am's evidence demonstrated a company in serious financial straits seeking to cut costs in an attempt to survive. The reduction-in-force was instituted to reduce what Pan Am viewed as a surplus of management personnel. The guidelines called for termination of the "least productive" employee in a designated peer group. Pan Am, using a numerical ranking system, evaluated its Reservations Supervisors on the basis of qualifications, abilities, productivity, and length of service. Additional credit was given to employees over 40 years of age. Coburn was terminated when he was evaluated the least productive. We find that Pan Am carried its burden of proffering a legitimate, nondiscriminatory reason for terminating Coburn by instituting a written policy, following it to the letter, and making an employment decision based on its results. The procedure satisfied Pan Am's statutory burden.

As in *Cuddy*, 694 F.2d at 857, Coburn then was required to show by a preponderance of the evidence that Pan Am's asserted reason was pretextual. Coburn pointed to numerous alleged inconsistencies and offered the testi-

mony of several witnesses in attempting to show that Pan Am manipulated its peer group analysis in a manner calculated to conceal age discrimination. The jury was apparently convinced by this evidence. The trial court, though, disagreed, finding that no reasonable jury could have so ruled. We now focus on that stage of the litigation, because the shifting evidentiary burdens had served the purpose of bringing "the litigants and the court expeditiously and fairly to the ultimate question" of discrimination. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

Coburn first notes that both employees terminated in the Eastern Central Region of Pan Am's organizational structure were over 40. This is pure coincidence. The oldest employee, age 51, in Coburn's Washington Reservations and Ticket Office was retained. The other two managers retained in Washington were close to Coburn in age, though slightly younger. No other evidence was offered to show that Pan Am terminated a disproportionate number of older employees. On this record no pattern of age discrimination could reasonably be inferred.

Coburn finds suspicious Pan Am's attempt to induce managers aged 55-65 to retire early. Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary. The evidence showed that Pan Am was justified in attempting to reduce its costs, and voluntary retirement was clearly a fair attempt to do so. It supports not a hint of age discrimination.

Coburn takes issue with the composition of his peer group. He complains because two younger women who were employed as Trainers were not included with his category of Reservations Supervisors. However, the evidence makes it clear the two positions were distinct and

not properly combinable under established Pan Am policies. Coburn also relies on the fact that these two female employees were later made Reservations Supervisors to show discrimination. However, these employees were only promoted after implementation of a merger between Pan Am and another airline. The merger resulted in less need for trainers and an increased volume of sales, an increase creating a new need for more Reservations Supervisors. That these trainers were promoted does not indicate an age discriminatory animus on Pan Am's part.

Coburn attempts to demonstrate inconsistencies between prior Pan Am evaluations and the reduction-in-force evaluation. He claims he was the highest rated supervisor in February 1980, yet rated lowest for purposes of the reduction-in-force in August, just six months later. The short answer to this contention is that it is not supported by the evidence. All four Reservations Supervisors were rated "good" in February and given substantially similar ratings on more specific categories. The reduction-in-force criteria were specifically designed to determine the "least productive" employee. Coburn was fired only after ranking lowest overall after being rated in four distinct aspects of his job, and after being given extra credit for being over 40 years old. While Coburn disputed his rating in several regards, he produced no evidence that age was the reason he was rated low. Therefore, evidence of Pan Am's motive in the peer group analysis is "one sided" against the jury's verdict. *Vander Zee* v. *Karabatsos*, 589 F.2d 723, 726 (1978). We must conclude that under any view of the case, the evidence concerning age discrimination and the reasonable inferences to be drawn therefrom simply do not support a finding that the peer group analysis was manipulated to Coburn's disadvantage because of his age.

Because none of Coburn's other contentions lend support to his claim, we do not discuss them in detail. We

only add that evidence of age discrimination cannot be gleaned from them.

The ADEA protects employees only against unlawful age discrimination. Coburn draws a compelling picture of a long-time loyal employee who may have been treated less than fairly. But the record is devoid of any evidence that age was a "determining factor" in Pan Am's decision to terminate him. *Cuddy*, 694 F.2d at 857. Coburn failed to carry his burden of proving discriminatory motive by a preponderance of the evidence and for a jury to find in his favor it would have to indulge in an impermissible speculation. The trial court properly granted judgment n.o.v. on Coburn's ADEA claim.

THE TITLE VII CLAIM

Our review of Coburn's Title VII sex discrimination cause of action is much more limited. Because the trial court acted as a trier of fact, we must affirm his findings unless they are "clearly erroneous". Fed. R. Civ. P. 52(a). Coburn's appeal of the Title VII judgment hinges on evidentiary rulings made by the trial court. While the court was restrictive on the evidence allowed in, we are unable to say the court abused its considerable discretion. On the state of the record, we are not "left with the definite and firm conviction that a mistake has been committed". *United States* v. *Gypsum*, 333 U.S. 364, 395 (1948). We are convinced that the trial court's rulings on the Title VII claim are not clearly erroneous.

CONCLUSION

We affirm the trial court's grant of judgment n.o.v. on Coburn's ADEA claim. Because of our holding we need not rule on the companion issues of the conditional granting of a new trial, the refusal to reinstate Coburn, and the denial of liquidated damages. We also affirm the judgment for Pan Am on the Title VII claim.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1543 September Term, 19 82

Civil Action No. 81-01086

Peter D. Coburn
Appellant

v.

Pan American World Airways, Inc.
Appellee

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1983

GEORGE A. FISHER
CLERK

BEFORE: Tamm and Wilkey, Circuit Judges; and McNichols*, Senior District Judge, U. S. District Court for the District of Idaho

ORDER

On consideration of the Petition for Rehearing of Appellant, filed July 19, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, CLERK

BY: Daniel M. Cathey
First Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1543 September Term, 19 82

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United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1983

GEORGE A. FISHER
CLERK

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges; and McNichols*, Senior District Judge, U. S. District Court for the District of Idaho

O R D E R

The Suggestion for Rehearing en banc of Appellant, filed July 19, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc, that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, CLERK

BY: Daniel M. Cathey
First Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).